No. 300 -301

SEP 21 19
CHARLES ELMORE CR
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Supreme Court of the United States

SOUTHERN RAILWAY COMPANY - - *Appellant,*

vs.

COMMONWEALTH OF KENTUCKY - - *Appellee.*

ANDREW W. MELLON, Director General of Railroads - - - - - - *Appellant,*

vs.

COMMONWEALTH OF KENTUCKY, EX REL., ETC., *Appellee.*

MOTION TO ADVANCE

The Commonwealth of Kentucky moves the court to advance this case on the following grounds:

This is the second appeal of this case to this court; for opinion on former appeal, see Southern Railway v. Kentucky, 274 U. S. 76. The case involves the taxes claimed by the state of Kentucky for the years 1917 and 1918. It was instituted March 8, 1920. Judgment was entered in the Woodford Circuit Court in favor of the railway, and was reversed on appeal: see Commonwealth, by etc. v. Southern Railway, 193 Ky. 474. On the return of the case to the circuit court, judgment was entered for the state, and this was affirmed, although the judgment in another case heard with it for the years 1914, 1915 and 1916 was reversed: See Southern Railway v. Commonwealth, 214 Ky. 388. The railway com-

pany appealed from the judgment in this case to this court and the judgment was there reversed: as above cited, 274 U. S. 76. On the return of the case to the circuit court additional pleadings were filed and the issues made up. Judgment was entered for the Commonwealth in the same amount as in the former judgment. An appeal from that judgment was affirmed: Southern Railway v. Commonwealth, 238 Ky. 638. The railway company has appealed to this court. In view of the fact that public taxes are involved and that this is the second appeal to this court; and that this litigation has lasted since 1920, we earnestly ask that the cause be advanced and heard on an early day to be fixed by the court.

J. P. HOBSON,
For Appellee

J. W. CAMMACK,
Attorney General of Counsel.

Received of J. P. Hobson, a copy of the above motion to advance with grounds therefor; and notice is accepted that said motion will be entered on the first day of the October term, 1931, of said court. This 10th day of September, 1931.

HUMPHREY, CRAWFORD & MIDDLETON,
For Appellants.

Nos. 300 - 301

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versus

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ANDREW W. MELLON, Director General of Railroads, - - - - - - - - - Appellant,

versus

COMMONWEALTH OF KENTUCKY, EX REL. &c., - Appellee.

APPELLANTS' BRIEF ON JURISDICTION AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI.

EDWARD P. HUMPHREY,
CHARLES W. MILNER,
Louisville, Kentucky,
Counsel for Appellants.

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Washington, D. C.,
Of Counsel.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

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1. This is the second appeal of these two cases. On the first appeal this Court reversed the judgment of the State Court 1

   Southern Ry. Co. v. Kentucky, 274 U. S. 76.

2. With no new fact in the record the State Court has affirmed the identical judgment that was reversed by this Court 1

3. The first appeal to this Court was prosecuted on the ground that Kentucky Statutes, 4077-4081, as construed and applied by the Court of Appeals of Kentucky in assessing a franchise tax amounted to a denial of the rights of appellants under the due process clause of the Fourteenth Amendment to the Constitution of the United States.
   The present appeal is prosecuted on the same ground 2, 3

4. On the prior appeal this Court held that the case was properly there on writ of error 3

   Southern Ry. Co. v. Kentucky, 274 U. S. 76-86.

5. The present appeal is based upon United States Code, Title 28, section 344, paragraph (a), which allows an appeal where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity 3

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6. The Court of Appeals of Kentucky in its last opinion erroneously assumed that this Court reversed the prior judgment on account of a defect in the pleadings of the Commonwealth 6

Southern Ry. Co. v. Commonwealth of Kentucky, 238 Ky. 638.

As a matter of fact the case was reversed on its merits 6

7. On the first appeal to this Court all facts with reference to the C. N. O. & T. P. Railway Company were covered by stipulation. Both this Court and the Kentucky Court of Appeals have held that a stipulation takes the place of both pleadings and proof covered thereby 8

Saltonstall v. Russell, 152 U. S. 28;
Lincoln County, etc., v. Board of Education, 225 Ky. 21-24.

8. The petition for rehearing filed by appellee after the first opinion of this Court shows that all facts with reference to the C. N. O. & T. P. Railway Company were in the record at that time 9

Therefore, the amended pleading filed by the Commonwealth after the return of the case to the State Court making claim for taxes on account of the C. N. O. & T. P. Railway Company is not a new matter in the record 8,9

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v.

COMMONWEALTH OF KENTUCKY, EX REL., &C., *Appellee.*

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, - - - - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, EX REL., &C., *Appellee.*

APPELLANTS' BRIEF ON JURISDICTION AND ALTERNATIVE PETITION FOR WRIT OF CERTIORARI.

This is the second appeal of these two cases from the Court of Appeals of Kentucky. On the first appeal this court reversed the judgment of the State Court in 274 U. S. 76. The cases have always been heard together.

The Court of Appeals of Kentucky has affirmed exactly the same judgment that was reversed by the Supreme Court of the United States without any new fact appearing in the record and without any change in the facts.

This is a proceeding by the Commonwealth of Kentucky to collect franchise taxes from the appellants arising during the period of Federal control of railroads.

All of the lines of railroad controlled by the Southern Railway Company operating in Kentucky have already paid taxes on their tangible properties and franchise.

The first appeal to this court was prosecuted on the ground that the Statutes of Kentucky under which the Commonwealth is undertaking to collect these taxes, namely, Kentucky Statutes, 4077 to 4081, inclusive, as construed and applied by the Court of Appeals of Kentucky (the State court of last resort) amounted to a denial of the rights of the appellants under the due process clause of the Fourteenth Amendment to the Constitution of the United States. The court took jurisdiction on that ground and reversed the cases on their merits, holding that the point was well taken.

The present appeal is prosecuted on the same ground.

This court in its previous opinion (274 U. S. 76) said:

> "A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of certain lines of railway was affirmed by the highest court of that State. 204 Ky. 388. And see 193 Ky. 474. Reversal is sought on the ground that as applied these laws contravene the due process clause of the Fourteenth Amendment."

The writs of error on the first appeal were sued out on October 16, 1924 (Folios 338 and 347). The plaintiffs in error also prayed in the alternative for a writ of certiorari and petitioned the court accordingly.

This court in 274 U. S. 86, said:

> "A petition for certiorari was filed, but, as the case is properly here on writ of error, the petition will be denied.
>
> *"Judgment reversed on writ of error. Petition for certiorari denied."*

The Jurisdictional Act of 1925 enacted by Congress did not take away from a litigant his right of appeal from the court of last resort of a State to the Supreme Court of the United States where there was drawn in question the validity of a State statute on the ground of its being repugnant to the Constitution of the United States and where the decision of the State court was in favor of the validity of such statute.

Of course we no longer have writ of error as appeal has been substituted in all cases where writ of error was formerly employed.

The present appeal is based upon U. S. Code, Title 28, section 344, paragraph (a), which allows appeal as a matter of right where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity. This is the appellants' case exactly. We now contend (just as this court has heretofore decided) that the Statutes of Kentucky, under which the Commonwealth of Ken-